

Law Commissions Act 1965

First programme of the Law Commission

*Laid before Parliament by the Lord High Chancellor
pursuant to Section 3 (2) of the Law Commissions Act 1965*

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HER MAJESTY'S STATIONERY OFFICE
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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NOTE BY THE COMMISSIONERS

1. In preparing our first programme we have had in mind the following practical considerations relating to the subject matter and method of working:—

- (i) The first is the avoidance of duplication of effort. Thus we have excluded matters which are currently under consideration by other agencies of law reform (both standing and *ad hoc*), e.g. evidence, imprisonment for debt, minors, and coroners.
- (ii) The second is that we have excluded those projects on which we cannot expect to make an immediate start.
- (iii) The third is the desirability of examining studies already completed by other law reform agencies with a view to considering whether their recommendations, if not yet implemented, should be endorsed and supported by the Commission.
- (iv) The fourth is that we shall, where necessary, consult with Government departments and others interested in or able to assist with the particular subject matter which we have selected for examination.
- (v) The fifth is that with regard to those subjects included in our first programme which are suitable for joint study with the Law Commission for Scotland we propose to maintain close contact with the Scottish Commission; in fact we have already been in consultation with the chairman and secretary of that Commission.

2. Our first programme, however, must also be considered in the light of the broader purposes and functions of the Commission as laid down in the Law Commissions Act. We would not wish, at all events at this early stage, to attempt any comprehensive statement of the principles which should guide us in our task. But we are fully agreed on some of the *desiderata* and would briefly state them as follows.

3. It is desirable that the law should be simpler, more readily accessible, more easily understandable and more certain than it is today. Consolidation and codification are important means of simplification. We intend to recommend the use of both these instruments for the reform of the shape and substance of our law. Whilst these projects go forward, we shall continue to investigate other means of simplifying our statute law, paying particular regard to the forms in which it is cast.

It is very important that statutes should be interpreted with common sense; it is by no means certain that our existing rules always allow this to happen. Therefore we propose an examination of the interpretation of statute law.

4. We have included in the present programme three subjects which we suggest should be examined with a view to codification: the law of contract, the law of landlord and tenant, and family law. We believe that the law of evidence is another topic worthy of examination with a view to codification; but we have not made this recommendation in view of the present labours of the Law Reform Committee and the Criminal Law Revision Committee.

5. English law, in its history and substance, exhibits a great respect for both the concept and the application of the rule of law. If our law is to

survive as one of the great legal systems of the world, it is necessary that a proper balance be struck between that concept and the administrative techniques of a highly developed industrial society. This is a very complicated problem upon which the Commission requires further time for study before making specific proposals.

6. A great deal will have to be done before it can be justly said that our legal system is in harmony with the social and economic requirements and aspirations of a modern state.

This requires, on the negative side, elimination of a certain number of actions which in 1965 are mere anachronisms. On the positive side we recommend examination of certain subjects vitally important to commerce, industry and the public at large such as, in the field of tort, the scope of strict liability and, in contract, the permissibility of exclusion clauses and the doctrine of fundamental breach.

Then again there is the wide problem of automatically adjusting the operation of the legal system to changes in prices, wages and relevant factors affecting the cost of living. We propose to make a start by suggesting re-examination of the present financial limits on magistrates' orders in domestic and affiliation proceedings.

7. It is eminently desirable that the legal system should be capable of making a rapid remedial response to defects exposed, by judicial comment or otherwise, in the course of the day-to-day operation of the law.

We propose to deal with such defects by recommending from time to time as required the enactment of a Law Reform (Miscellaneous Provisions) measure.

8. It is equally important that the law should promptly respond to informed criticism of certain developments of principle, made on the ground that such developments are jurisprudentially unjustifiable or socially questionable. We would quote two instances. One is the doctrine of imputed intent as expounded by the House of Lords in *Director of Public Prosecutions v. Smith* [1961] A.C. 290; the other is the recent decision of the House of Lords in *National Provincial Bank Ltd. v. Ainsworth* [1965] 3 W.L.R. 1, where it was held that the rights of a deserted wife were of their nature personal rights and could not be treated as in any sense constituting a clog on the property of the husband. Both of these developments call for examination and are therefore included in our first programme.

19th July 1965.

FIRST PROGRAMME

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I

CODIFICATION OF THE LAW OF CONTRACT

The law of contract is the basis of trading and many other legal relationships. Its clarity and accessibility are therefore of the greatest importance. The general principles of the law of contract are now well established and the Commission regards it as ripe for codification.

The Commission accordingly recommends an examination of the law of contract, quasi-contract, and such other topics as may appear in the course of the examination to be inseparably connected with them, with a view to their codification. In this examination it will be necessary to take into account the results of the examinations recommended under headings II and III below, and to pay special attention to the recommendations on innocent misrepresentation made by the Law Reform Committee in its Tenth Report (1962 Cmnd. 1782), to its pending report on the transfer of chattels, and to those topics on which the law may be considered to be unsatisfactory, such as mistake, unjust enrichment and the restitution of money and (so far as relevant) other property.

Recommended : that the law of contract be examined with a view to codification.

Examining agency : the Commission.

II

EXEMPTION BY CONTRACT FROM COMMON LAW LIABILITIES

Although the Committee on Consumer Protection (1962 Cmnd. 1781), the Molony Committee, recommended certain restrictions on the rights of vendors and finance companies to contract out of their common law and statutory liabilities, the Committee felt unable to consider the general application of provisions exempting from, or limiting liability for, negligence. In the Commission's opinion, the manner of incorporation and effects of such provisions should now be fully examined.

The scope of the doctrine of fundamental breach, the growth of which has diminished to some extent the effect of exemption clauses, should also be examined.

Recommended : that an examination be made of the following matters:

- (a) the desirability of prohibiting, invalidating or restricting the effects of clauses exempting from, or limiting liability for, negligence ;
- (b) the extent to which the manner of incorporating such clauses, if permissible, should be regulated ;
- (c) the desirability of any extension or alteration of the doctrine of fundamental breach.

Examining agency : for (a) and (b), an interdepartmental committee ;
for (c), the Commission.

III

CONSIDERATION, THIRD PARTY RIGHTS IN CONTRACT AND CONTRACTS UNDER SEAL

The Sixth Interim Report of the Law Revision Committee (1937 Cmd. 5449) made certain recommendations on consideration and third party rights in contract which have never been implemented. A memorandum by Mr. Justice (now Lord) Goddard, annexed to the Report, recommended that contracts under seal should no longer be treated differently from other contracts in writing.

Recommended : that, in the light of that Report, an examination be made of the doctrine of consideration in the law of contract (having regard to the law of equitable estoppel), third party rights in contract and contracts under seal.

Examining agency : the Commission.

IV

CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES

Although this branch of the law has acquired a greatly increased importance in modern conditions, its haphazard development has resulted in many uncertainties and in a number of distinctions of a highly technical character not apparently justified by differences in the subject matter. Examples are the liability, which is notoriously uncertain, of a person for the acts and defaults of his independent contractors, and the special defences applicable in this branch of the law, in which there are seemingly capricious variations.

Recommended : that an examination be made of the basic principles of liability applicable to dangerous things and activities, with a view to clarifying and harmonising and, so far as may be expedient, unifying the principles in question.

Examining agency : the Commission.

V

CIVIL LIABILITY FOR ANIMALS

It is widely recognised that this branch of the law is in an unsatisfactory state and that it continues to apply rules and draw distinctions which make little sense in modern conditions.

Following the Report of the Committee on the Law of Civil Liability for Damage done by Animals (1953 Cmd. 8746), the Goddard Committee, there has been repeated public discussion of the matter, but none of the proposals of the Committee has yet been implemented.

Realising that reform in this field is controversial, the Commission nevertheless takes the view that modernisation and simplification are necessary.

Recommended : that in the light of the Goddard Report the law as to the civil liability for damage done by animals be examined.

Examining agency : the Commission.

VI

PERSONAL INJURY LITIGATION

Actions to recover damages for personal injuries not only account for a large part of civil litigation but also give rise to widespread dissatisfaction with the working of the courts. In this context criticism and proposals for reform have centred mainly on two points: jurisdiction and procedure; and the assessment of damages.

(a) *Jurisdiction and procedure*

The following jurisdictional questions appear to require examination: whether some actions which now go to the High Court should instead be dealt with by courts having a simpler and more speedy procedure; whether the determination of liability should be dealt with separately from the assessment of damages; and whether, in cases where there is a possibility of civil and criminal proceedings, some practicable means of avoiding a duplication of process may be devised. A number of procedural questions also merit consideration, in particular, the way in which medical evidence should be given.

(b) *Assessment of damages*

This is a problem which has attracted much attention. Questions for examination include: the usefulness of the jury as an instrument of assessment; limitations upon the revising function of the Court of Appeal; the impact of tax; the use of an actuarial approach and actuarial evidence; the proper principles which should govern the award of damages for pain and suffering and for loss of the amenities of life; and the adequacy and consistency of current awards of damages.

Recommended:

- (a) that an examination be made of jurisdiction and procedure in personal injuries actions with a view to simplification and expedition;
- (b) that an examination be made of the methods and basis of assessment of damages for personal injuries and practice relating thereto.

Examining agency: for (a), an *ad hoc* committee;
for (b), the Commission.

VII

CIVIL LIABILITY OF VENDORS AND LESSORS FOR DEFECTIVE PREMISES

The sale and letting of land and premises have widespread social implications and certain aspects of the law and practice in this field are dealt with under headings VIII and IX below. Another important aspect is the civil liability of vendors and lessors for defective premises.

A vendor's liability in contract may depend *inter alia* on whether the premises were at the time of the sale to be constructed or in course of construction, or already completed; and whether, if to be constructed or in course of construction, any implied warranty as to defects has been expressly or impliedly excluded.

A lessor's liability in contract may depend *inter alia* on whether the premises were furnished or unfurnished; whether the lessor was under any express covenant to repair and, if so, whether notice of want of repair has been given; and whether an obligation to repair is imposed by statute.

Liability in tort of the vendor or lessor for negligence may depend *inter alia* on whether the negligence arose before or after a sale or lease; and whether, where the negligence of a lessor is in question, he was under a contractual or statute-imposed obligation to repair.

The above distinctions require examination in the light of current commercial and social considerations with a view to establishing a proper balance between the principle of freedom of contract and the desirability of protecting the public.

Recommended: that an examination be made of the contractual and tortious liability of the vendor and lessor of defective premises.

Examining agency: the Commission.

VIII

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

The basic law of landlord and tenant, even apart from legislation controlling rents and securing tenure, is unduly complicated, anachronistic in many respects and difficult to ascertain. It is to be found in a very large number of statutes and cases, is largely self-contained and in the Commission's view is suitable for ultimate codification.

The law relating to waste and that governing distress for rent afford examples of the difficulties referred to above and are suitable for examination with a view to legislation as a step towards codification.

Recommended :

- (a) that an examination be made of the law on waste and distress for rent ;
- (b) that an examination be made of the basic law of landlord and tenant with a view to its modernisation and simplification and the codification of such parts as may appear appropriate.

Examining agency : the Commission.

IX

TRANSFER OF LAND

The system of compulsory registration of title is now in process of being extended to the whole country, but of necessity this is likely to take a considerable time. The Commission considers therefore that in the meantime the system of transferring unregistered land should be simplified and the procedure expedited and it accordingly welcomes the initiative of the Non-Contentious Business Committee of the Law Society on Conveyancing Practice, whose Report it is studying. Consideration of these matters must also take into account the Report of the Committee on Local Land Charges (1952 Cmd. 8440), the Stainton Committee, and the Report of the Committee on Land Charges (1956 Cmd. 9825), the Roxburgh Committee.

Recommended : that an examination be made of the system of conveying unregistered land with a view to its modernisation and simplification.

Examining agency : the Commission.

X

FAMILY LAW

The Commission envisages a new branch of the law embracing all matters which directly affect the family as such, whether they concern property, status, or otherwise, and contemplates the eventual enactment of a code of family law. As an initial step the Commission proposes the following studies.

(a) *Matrimonial law*

A further examination of the matrimonial law having regard to the variety of views expressed in and following the Report of the last Royal Commission on Marriage and Divorce (1956 Cmd. 9678), the Morton Commission.

(b) *Family inheritance and property law*

An examination of the rights of the family (including illegitimate children) in testamentary and intestate succession and in family inheritance; and of the property and other rights of the spouses *inter se* and *vis-à-vis* third parties, including any "equity" which should accrue to one or both of the spouses (having regard to the observations of the House of Lords in *National Provincial Bank v. Ainsworth* [1965] 3 W.L.R.1). In such examination due regard should be had to the pending Report of the Committee on the Law of Succession affecting Illegitimate Children under the chairmanship of Lord Justice Russell.

(c) *Jurisdiction in family matters*

An examination of the jurisdiction of the courts dealing with family matters (including wardship and guardianship); in particular as to how such jurisdiction should be allocated as between the courts, and whether or not any new courts should be constituted to deal with such matters.

In such examination account should be taken of the Report of the Committee on Conflicts of Jurisdiction affecting Children (1959 Cmd. 842), the Hodson Committee, and of the pending Report of the Committee on the law relating to Minors, under the chairmanship of Mr. Justice Latey.

Recommended: that a preliminary examination be made of these three topics with a view to proposing, in the light of their social implications, the agencies to which they should be referred.

Examining agency: the Commission.

XI

FINANCIAL LIMITS ON MAGISTRATES' ORDERS IN DOMESTIC AND AFFILIATION PROCEEDINGS

This is a matter relating to family law of which separate and immediate examination is required. The Commission considers that an examination should be undertaken of the financial limits prescribed by statute for orders which may be made in magistrates' courts for the maintenance of spouses and children, having regard to the adequacy of the limits now laid down, the question whether the existence of such limits is desirable and, if so, the appropriate machinery for adjusting them to changing circumstances.

Recommended : that such examination be made.

Examining agency : an interdepartmental committee.

XII

RECOGNITION OF FOREIGN DIVORCES, NULLITY DECREES AND ADOPTIONS

In the development of the proposed Code of Family Law consideration will have to be given to the way in which the law of this country deals with status acquired under, or affected by, the law of other countries. Uncertainty and hardship arise from the rules governing the recognition in English law of divorces, decrees of nullity of marriage and adoptions obtained in, or having effect under, the law of other countries. The Hague Convention on Adoption 1964 has an important bearing on these problems.

Recommended : that an examination be made of these rules.

Examining agency : the Commission.

XIII

IMPUTED CRIMINAL INTENT (D.P.P. v. SMITH)

The decision of the House of Lords in *Director of Public Prosecutions v. Smith* [1961] A.C. 290 raises important and controversial issues as to the nature of the intent required in criminal offences.

A differing view of the law has been taken elsewhere in the Commonwealth, and the question arises as to the possible effect of the decision generally in the law of crime.

Recommended: that an examination be made of the effect and implications of the decision in *D.P.P. v. Smith*.

Examining agency: the Commission.

XIV

COMMON LAW MISDEMEANOURS; CRIME OF CONSPIRACY

Certain aspects of the law relating to common law misdemeanours require examination. These include the questions how far the existing common law misdemeanours should be abolished or replaced by statutory offences and whether the existing penalties should be revised. Particular questions arise in relation to the crime of conspiracy; the scope of conspiracy as a crime, its relationship to other offences (e.g., attempts to pervert the course of justice), the penalties which it carries, the joinder of charges of conspiracy with other charges and the degree of particularity required in the charge are matters which have given rise to doubt and criticism.

Recommended: that an examination be made of these matters and that the Home Secretary be asked to refer this examination to the Criminal Law Revision Committee.

Examining agency: the Criminal Law Revision Committee.

XV

MISCELLANEOUS MATTERS INVOLVING ANOMALIES, OBSOLESCENT PRINCIPLES OR ARCHAIC PROCEDURES

Much of English law is heavily overlaid with history. This does not mean that the principles involved may not still be applicable in modern conditions, subject to necessary adjustments from time to time. There are, however, certain parts of the law which seem to rest on social assumptions which are no longer valid or to involve archaic procedures. The topics mentioned below constitute only a first list of such matters which would appear to call for attention.

- (a) Actions for loss of services, loss of consortium, seduction, enticement and harbouring, and the extent to which employers, spouses or parents should be entitled to recover wages or payments made

to or on behalf of an employee, spouse or child, as the case may be, who is the victim of a tort. These matters have been the subject of a detailed survey, with proposals for reform, in the Eleventh Report of the Law Reform Committee (1963 Cmnd. 2107).

- (b) Actions for breach of promise of marriage and a husband's claim for damages for adultery in matrimonial suits.
- (c) Actions for pound-breach, rescous and replevin.
- (d) The tort and crime of maintenance.
- (e) Certain ancient criminal offences. The Criminal Law Revision Committee in its Seventh Report (1965 Cmnd. 2659), in proposing in paragraph 70 the abolition of the obsolete punishments of forfeiture of property and being placed outside The Queen's protection for such offences, drew attention to the case for their abolition in the interests of modernising the Statute Book.

Recommended : that an examination be made of these five topics.

Examining agency : the Commission.

XVI

JUDICATURE ACT (NORTHERN IRELAND)

Since the effect of section 1(5) of the Law Commissions Act 1965 is that the responsibility of the Commission in the exercise of its functions under section 3 of the Act extends to such part of the law of Northern Ireland as the Parliament of Northern Ireland has no power to amend, a member of the Commission visited Northern Ireland to ascertain in particular whether there were matters in that country within the Commission's competence which were there regarded as in present need of modernisation and reform. It was found that there was a strongly expressed and urgent call for modernisation of the statute law (most of which dates from the latter part of the last century) dealing with the Supreme Court of Judicature, Northern Ireland, which is a matter reserved for the legislative power of the United Kingdom Parliament. This demand was voiced not only by members of the Government and Judiciary of Northern Ireland, but also by representative members of both branches of the legal profession.

Recommended : that an examination be made in Northern Ireland of the statute law dealing with the Supreme Court of Judicature of Northern Ireland with a view to the presentation to the Parliament of the United Kingdom of a modernised Judicature Bill for Northern Ireland designed to meet the present-day requirements of that country in the interests of a more expeditious, simple and efficacious system for the administration of justice by that Court in its High Court and Appellate Divisions.

Examining agency : an *ad hoc* committee.

XVII

INTERPRETATION OF STATUTES

It is evident that a programme of law reform, which must necessarily use the instrument of legislation, depends for its successful realisation on the interpretation given by the courts to the enactments in which the programme is embodied. The rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established. The difficulty which faces the courts may be enhanced by present limitations on the means, other than reference to the actual text of the statute, for ascertaining the intention of the legislature. These difficulties are especially noticeable where English courts are called upon to interpret legislation implementing international conventions. In some Commonwealth and other countries different approaches to the problem of interpreting legislative instruments have been adopted which merit consideration.

Recommended: that an examination be made of the rules for the interpretation of statutes.

Examining agency: the Commission.